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ABSTRACT

Reviewing California state legislation and education code, this paper discusses the rights of community college administrators to continued employment and related obligations of college districts. Following an introduction reviewing common practices in the state regarding certificated and classified administrative positions, key elements of employment law are described related to provisions in the First and Fourteenth Amendments to the U.S. Constitution, due process, issues of discrimination, and necessary components of employment contracts. Next, sections related to employment in the California Education Code and the California Code of Regulations are identified. Assembly Bill 1725, which became law in July 1990, and mandated changes in hiring policies and managerial procedures is also discussed. Issues related to the employment policies and procedures of local district boards are then briefly discussed and the merit system established by the Education Code is described, focusing on its operation, organization, and administration. The political structure of personnel decisions is then discussed, focusing on the autonomy of the Board of Trustees and the role of the state Chancellor's Office. Fourteen court cases involving employment disputes are then reviewed, including cases related to tenure and its determination, bias and due process, and discrimination in hiring, and a summary is provided of employment conditions for administrators at state community colleges. Finally, recommendations for improving employment practices are provided. Contains 11 references. (HAA)

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# EMPLOYMENT RIGHTS OF ADMINISTRATORS

# IN THE CALIFORNIA COMMUNITY COLLEGES

by

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April 2, 1997

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Employment Rights of Administrators in the California Community Colleges

Introduction

Administrators in the California Community Colleges experience high turnover. The lack of stability, measured in average lengths of employment, is greater in urban environments than in the rural communities. Turnover in presidential and academic administrative positions is greater than the turnover in classified management positions. Politics, and therefore employment policies, are issues to consider when a President/Superintendent or a senior administrator is hired, fired, transferred or not reappointed.

Discrimination in employment actions is illegal. There are many laws directly relating to employees, both as members of a protected group or as individuals. However, many employment actions that are detrimental to individual administrators often fall outside of the purview of statutes, institutional policies, common practices and even discrimination as commonly defined.

Administrative employment relationships between employees and their colleges vary by position and by college. Notwithstanding, the system structure of the California Community Colleges provide a network where the colleges are linked with one another and that prescribes many foundational themes to the individual colleges. California has established a community college system that is under the auspices of and administered by the Board of Governors. There are thirteen members on the Board that are appointed by the Governor and approved by the State Senate. This paper will address some of the rights of

administrators to continued employment and, conversely, some of the obligations of a college district to continue the employment of an administrator.

Administrative positions in the California Community Colleges are categorized as "Certificated" or "Classified." Certificated positions are generally related to direct education, academic responsibilities and student services. These positions commonly include the President/Superintendent, Vice President of Instruction, Vice President of Student Services, Academic Deans, Vocational Deans, the Athletic Director, and various other administrative positions having direct influence on policy making that affects the students. Certificated positions are contract positions, implied or by executed agreement. The President of a college will usually be employed under a time certain contract that addresses responsibilities, performance standards, compensation, and employment conditions. Contracts are commonly for three years, but may vary. Most of the other certificated administrative positions are annual appointments and fall under the rules of the California Education Code.

Classified administrative positions commonly relate to the business functions of the college. Examples of classified positions include the Business Manager, the Director of MIS, the Director of Personnel, the Director of Facilities, the Director of Maintenance and Operations, and the Director of Security. These classified positions are generally considered career positions. However, the individual appointments may be contracted for a specific period of time, such as two to three years. Career positions imply that there will be an ongoing relationship between the employee and the college and that there are no definite

time limits in effect. Of course, the relationship between the employee and the college assumes that performance by the employee is satisfactory as measured against the requirements of the position.

A recent development in the employment picture of administrators is the emergence of administrative representation. The administrators of the Los Angeles Community College District organized into certificated and classified management associations. The associations represent administrators on employment issues to the District and work on the behalf of their member administrators. Issues of job descriptions, due process, work environments, security and grievance procedures are addressed by the associations. The certificated group of LACCD organized under the California Teamsters Local 911 and negotiated their first contract two years ago. Now, for the first time, administrators are negotiating compensation and benefits. The distinction between staff and management is less clear as the authority of management has been affected by the operations between the local boards and the executives.

Employment Law and the California Community Colleges

Constitutions are the fundamental source for determining the nature and extent of governmental powers. They are the source of protection for the people and the basis for individual rights and liberties. The First Amendment of the U.S. Constitution protects speech, press and religion. These are issues that often surface in education. The Fourteenth Amendment provides for due process and equal protection. They protect the rights of both institutions and the people.

Due process is a measure of protection against governmental arbitrariness (Yudof, Kirp & Levin 1992). There are four aspects of due process (Alexander & Alexander 1992) written into the federal constitution: (1) substantive due process is the right to be employed in one's chosen occupation, (2) procedural due process applies to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property and it balances the employee's interest in reemployment against the District's interest in denying reemployment, (3) the vagueness test most commonly refers to requirements that employees take loyalty oaths, however, most oaths are substantially vague in their interpretations and therefore are unconstitutional, and (4) the irrationality and presumptions test as applied by the Supreme Court requires a rational connection between the facts and the presumed results.

If an employee proves by a preponderance of evidence that he or she is a member of a protected class, was qualified for the position, was replaced by a person outside of the protected class or if a lesser qualified person outside of the protected class was retained, then the employee has established a prima facie case of discrimination (Nolte 1983). A prima facie case creates a presumption of discrimination that must be rebutted by the school board. If the school board cannot rebut the alleged discrimination, the Court will restore the employee's position with back pay, expenses and damages (Lee versus Russell County Board of Education, Alabama 1982).

In the event that there are conflicting rules between one or more of the provisions in the various legislation, the hierarchy of the judicial system then

determines which authority supersedes the other. In addition to those provisions listed above, there are other laws which may affect individual situations such as state common law, foreign or international law, general state labor laws, academic customs and case law.

The power to employ or not to employ an administrator is legislated by the State to be among the discretionary powers of the local school boards. However, actions taken by the local school boards cannot be arbitrary or capricious, or in violation of an individual's statutory or constitutional rights. Employment decisions must be neutral in relation to race, religion, national origin, and sex.

Employment contracts must contain the basic elements of all legal contracts. There must be (1) an offer and acceptance between parties, (2) competent parties, (3) consideration, (4) legal subject matter, and (5) proper form. The employment contracts must also meet the state legal requirements. Contracts cannot be used as a means of waiving statutory rights.

California Education Code

California has legislated the establishment of the California Community College System in its Education Code. Title 1 of the Education Code covers all of the general provisions for state education, including the Merit System. In addition to the general provisions of the Education Code, Title 3, Postsecondary Education, Division 7, Parts 43-51, specifically address the authorities, structures, administration, programs, facilities, finance and employment of the California Community Colleges. Part 51, Chapters 1-4, Sections 8700-88999 address community college employment.

California has established the Board of Governors to oversee the community college system. The Education Code defines their duties, rules, regulations, authority and delegation. The Education Code, Sections 72000-72999, establishes local districts and local governing boards. The local Board of Trustees, comprised of elected representatives from the local community, are authorized to develop and adopt policies and procedures by which to govern the individual districts and colleges. These policies and procedures are law, as the authority for their creation is provided for by the California statutes.

Section 72411.5 of the California Education Code states that "In the absence of an expressed appointment or contract, every administrator shall serve in his/her administrative assignment at the pleasure of the governing board." This is generally referred to as "At Will" employment. This protects the District against continue employment rights for administrators.

Section 72411 limits administrative employment contracts to a maximum of four years. Administrative appointments without expressed employment terms are subject to annual termination at June 30th. Notices of potential non-reappointment shall be given to the administrator on or before March 15th.

Sections 87001-87003 defines Academic Employees, Classified Employees, Administrators, and Faculty.

Article 3, Chapter 1, Part 51 of Division 7 addresses the interchange of personnel between academic and classified positions.

Sections 88000-88270, Chapter 4, Part 51 of Division 7 are the provisions relating to Classified Employees. These sections address work assignments, work schedules, employee benefits, retirements, layoffs, etc.

California Code of Regulations

California, through the Office of Administrative Law, has developed administrative rules and regulations that govern all education within the State. The California Code of Regulations (CCR) Title 5 governs Education. Division 6, Chapter 4, Title 5 is devoted to the California Community College Employees. The Courts are required to take judicial notice of contents of regulations published in the Code of Regulations pursuant to Government Code, Section 11344.6 Affirmative action and equal opportunity are issues discussed in Chapter 4 Employees.

Assembly Bill 1725

Assembly Bill 1725 became law in July 1990 and mandated a series of sweeping changes in the governance and operations of the California Community Colleges. The law provides for local districts to undergo a process by which administration and faculty may agree on the implementation of this law. The law addresses the hiring policies and procedures of management. As a result, evaluations and appointments of administrators are required to comply with the District's negotiated and adopted AB 1725.

The intent behind AB 1725 as it relates to administrative appointments and other personnel actions is to embrace the concept of shared governance in the policies and decision making processes of the college. This ensures faculty

involvement in the evaluation processes of administrators. Collaboration and politics are issues that administrators must attend to in order to be successful.

Board Policies and Procedures

The local district adopts policies and procedures by which it governs the operations of the college. Board policies, personnel policies, personnel practices, administrative policies, collective bargaining agreements and the personnel commission rules are treated as local laws.

Though the local districts have significant freedoms in creating policies that are responsive to their needs, they must operate within those adopted policies and procedures. Board policies must be consistent with other policy and agreement documents that have been approved by the Board. Conflicts in policy between district documents will render the policy inapplicable.

Merit System

The California Education Code provides for the establishment of the Merit System. Districts may elect to become a Merit System district through a simple majority vote by the classified staff. Section 88050 Article 2 of the Education Code defines the inclusion process for a school district. Article 3, beginning with Section 88060 covers the organization, authorities, operating procedures and termination of the Merit System. The Merit System establishes a level of protection and representation for all classified staff within a district and serves to ensure that fair employment practices are followed by the employer. The Merit System is administered by a Personnel Commission. The personnel commissioners are legislated to have authority over the Board of Trustees with

respect to individual grievances and in certain personnel areas such as recruitment, selection and compensation. They are the final local authority on issues relating to classified employee rights and protection. Personnel commissioners are selected after an open search process conducted at the local district. Candidates must meet specific qualifications and are selected by the local Board of Trustees for three year terms. The chosen candidate's applicant file is forwarded to the Chancellor's Office for approval. The Chancellor's Office retains the authority to approve, or not to approve, candidates for the Personnel Commission that have been recommended by the local district.

Political Structure

The Board of Trustees approves all personnel actions, including hiring, compensation, termination, promotion, and discipline. A majority vote by the Board of Trustees in a public meeting approves personnel actions within the jurisdiction of the local governing board. The Chancellor's Office has adopted an arms-length posture in the administration of local affairs. Therefore, for most purposes, the local district is autonomous in the decisions of personnel within the bounds of State and federal employment laws.

A result of the local nature of the governing board are the frequent personal relationships that are present between the employees and the individual board members. A number of the employees are potentially classmates, friends, or neighbors. A position on the Board of Trustees may be won with as few as 1,500 votes, depending on the community, competition and voter turnout. There are times when the Board of Trustees will disagree with the

administrative recommendations. The reasons for the disagreements are not necessarily discussed and the influences upon the members are not necessarily known to administrators or the public. Democracy in action defines politics. The point being, policies and decisions of the college are and can be affected by a small number of people reaching the decision makers.

Case Reviews

In Spurlock versus the Board of Trustees, Wyoming (1985), the Court found that the school district was under no obligation to renew the contract of a principal. The protection of tenure extends only to teaching positions, or as defined by the State. Tenure rights may extend to non-teaching certificated positions, but normally do so under local district rules and regulations. Tenure may be negotiated for non-teaching positions as part of an employment agreement with a bargaining group.

In Smith versus Board of Education of Urbana School District No. 116, 7th Circuit (1983), the Court held that due process was not violated when coaches were not reemployed. The reasoning was that coaches were not covered under the state tenure law, and therefore had no property interest in reemployment.

In Crump versus the Board of Education of Hickory Administrative School Unit, Supreme Court of North Carolina (1990), the Court found that the bias of a single board member in a hearing on the termination of an employee made the decision making process inherently unfair. This violated the due process rights of the employee and entitle the employee to compensatory damages.

In Bishop versus Wood, U.S. Supreme Court (1976), the Court found that in the absence of statutory or contractual entitlement to continued employment, where reasons for discharge were damaging to the employee, but not made public, the employee had no rights to a pretermination meeting.

In Codd versus Velger, U. S. Supreme Court (1977), the Court found that the lack of a pretermination hearing did not damage her reputation nor her chances for future employment even though there was critical information in the employee personnel file.

In Rutherford versus California State Personnel Board, California State Court of Appeals (1980), California State University granted Rutherford tenure as an associate professor even though his entire work experience was as an administrator. When the job was abolished, the president did not offer Rutherford any of the available administrative positions. The Court ruled that Rutherford must be offered the next available administrative position, regardless of the superior credentials of the other applicants.

In the Board of Regents versus Roth, U.S. Supreme Court (1972), the Court held that David Roth was not entitled to a reasonable expectancy of continuous employment, which would then create a property interest meriting due process protection. Mr. Roth was only entitled to a property interest for the duration of the contract. Nonrenewal of a contract violates no rights. The Court addressed the issue of "liberty" interests. Liberty interests would be applicable if there was damage done to Mr. Roth and his potential for future employment during the process of nonrenewal. Examples of damage would include negative

statements, inaccurate statements, or any other actions that might diminish the employee's name, reputation, honor or integrity. An important finding of the Court was that due process was not violated when the University dismissed Roth without notice of the reasons and without a hearing.

In Mt. Healthy City School District Board of Education versus Doyle, U.S. Supreme Court (1977), Doyle claimed that he was not renewed as a teacher as a result of his exercising his constitutional rights under the First and Fourth Amendments. The Court asked whether other legitimate grounds, independent of the amendment rights, were involved in not extending tenure. If other grounds existed, the fact that the school board included some impermissible grounds in its decision would not save the teacher's job. The Court tried to balance the rights of the individual with the important social interest in conducting effective and efficient public education.

In State of Indiana ex rel. Anderson versus Brand, U.S. Supreme Court (1938), the Court found that the tenure contract between the State and a teacher could not be unilaterally canceled by the State. The teacher had a vested property right and did not violate her contract according to State Constitution.

In Cleveland Board of Education versus Loudermill-Parma Board of Education, U.S. Supreme Court (1985), the public employee was given a hearing only after he was already dismissed. The Court ruled in the employee's favor, holding that he had a right to a hearing prior to being terminated.

In Griggs versus Duke Power Co., U.S. Supreme Court (1971), the Court ruled that tests and the requirement of a high school education were not legal as

employment practices because they resulted in excluding Blacks from employment opportunities. This practice would continue the racial imbalance among employees that was present in the organization. Employment practices or acts are illegal if they create a racial imbalance.

In Johnson versus University of Pittsburgh (W.D. Pa. 1977), the Court dealt with alleged sex discrimination against women by the institution. As an observation, the Court stated that determining qualifications for college professors on promotion and tenure were beyond the Court's field of expertise. In the absence of a clear burden of proof by the plaintiff, the Court must leave such decisions to the Ph.D.s in academia.

In Washington versus Davis, U.S. Supreme Court (1976), the Court distinguished between disparate impact cases brought under the Title VII and those under the Equal Protection Clause. An act or law may be unconstitutional solely because it has a racially disproportionate impact, regardless of purpose.

In Personnel Administrator of Massachusetts versus Feeney, U.S. Supreme Court (1979), the Court elaborated on the requirement of intent to discriminate in order to establish a violation of the Equal Protection Clause.

Summary

The lack of stability in administrative positions creates problems for faculty trying to teach their students in the most effective manner. The frequent changes in administration creates a working environment of constant change. Time and energy is expended by faculty in response to administrative changes

instead of keeping abreast of the most current information and in lieu of working to improve teaching methods to their students.

Administrators are seeking employment security and desire protective mechanisms. The issue addresses whether or not administrators have rights to continued employment. In lieu of property rights, that cannot be taken from persons without due cause and compensation, administrators seek remedies that would mitigate their hardships resulting from unemployment.

The issue for administrators is that of job security. In the California Community Colleges, the majority of senior administrators have very little job security. There are three categories of administrative employees, each with a different level of protection. They are the annual certificated administrators, contract administrators, and classified administrators.

Certificated administrators are annual employees as defined by the California Education Code. Certificated administrators generally have no property interests in continued employment unless there are specific collective bargaining agreements or individual contracts that provide security to them. The specific hiring documents in each college district details the terms of employment, rates of compensation, and any other pertinent information. The Education Code provides an annual procedure for due process to the administrator in the event the district decides not to renew the appointment. This is commonly referred to as the "March 15th" and "May 15th" notices. There is no specific State provisions for administrative employment rights, nor any specific

federal provisions. However, administrators do not lose any of their constitutional rights or employment protections provided to the general public.

Contract administrators are those employees who have individual employment agreements with the local district. These employment agreements will specify terms of employment including duration, compensation and right to continued employment, if any. The individual agreements will bind the district and the administrator to the provisions agreed upon. Generally, these contracts are from one to three years in length and contain termination clauses on how the agreement would cease to exist.

Classified administrators are generally working in career positions. These positions are not time specific. There are no preset ending dates on these district positions, unless they are being filled on an acting or interim basis. Employees normally work through a probationary period and are subject to periodic employment evaluations.

Administrators currently work on two six month cycles, resulting in ineffective productivity for the college. The Education Code requires the District to issue March 15th notices to all administrators that might not be rehired in their current positions for the following year. As a practical matter, the decision on whether or not the administrator is exposed to non-renewal is based on the period beginning in the Fall semester to early Spring. If the administrator receives a March 15th notice, the administrator may receive a May 15th notice stating that he/she will not be reemployed. If the administrator does not receive a May 15th notice, the administrator has been reappointed for the next academic

year. The cycle begins again in the Fall. Productivity of the administrator will revolve around the notice dates. There is little motivation to produce if a May 15th notice has been received. The timing is especially poor to recruit new administrators at the end of the Spring term to begin in the Fall. It is unreasonable to expect high productivity from a new administrator in the first semester. Therefore, it is already the second year before an evaluation can have significant meaning.

Administrators receiving notices on non-reappointment who can prove discrimination to the court will cause the court to rule the action illegal and to rule that the administrator be reinstated to the previous position without lapse. Discrimination cases are commonly brought forth under the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. Under the Equal Protection Clause, the intent to discriminate must be proven by the plaintiff. Under Title VII, discriminatory intent does not need to be proved. Rather, the plaintiff needs only to show that the effect of the action resulted in discrimination. Inconsistencies between local policies and practices will also cause the action to be reversed by the Court.

There were five teacher strikes in the United States in 1965 (Wirt and Kirst 1992). The number of strikes reached a high of 218 in 1973. There has been a steady decline in the number of strikes to 68 in 1982 and 39 in 1987. The decline in strikes may indicate that teachers are more satisfied with their employment situations now than in the past. It may indicate that faculty are not as secure in their employment, and are thinking that they may lose their jobs if

they were to strike. Administrators have not had that opportunity. Administrators may be the next group to unionize and attempt to flex muscle in bargaining for rights and compensation.

It is understandable for employees to want security in order to plan their lives. Security for administrators may indeed have a positive effect on productivity and result in more effective operations for the colleges. The dilemma is balancing the changing demographics of the communities that result in changes of priorities for the colleges with the need for stability in the politically affected positions of senior administrators. The challenge, restated, is to respond to changing needs and wants that create deficiencies in representation in a democratic environment, in a fair and humane manner.

Administrative positions with the California Community Colleges are political and volatile. The membership of the local Board of Trustees for community colleges is subject to change with every election. Elections are held almost every other year. Classified positions are generally more secure than certificated positions because of the career nature of the employment relationship. Those these positions are also affected by the politics of the local organization, there are protections and due process requirements associated with the termination of these assignments.

Employment stability is rare in senior administrative position in the California Community Colleges. The turnover in these positions are directly impacted by the stability in the Board of Trustees and in the cohesiveness of their working relationships.

Recommendations

Unions do not represent the students and therefore, their focus is to benefit the providers of services, not the consumers. This simple logic concludes that though unions may benefit administrators, it will not drive improved services and education to students.

Senior administrators have demonstrated skills and achievements in order to successfully land these positions. The positions are competitive and political. The process of applying for and successfully competing for these jobs is difficult and time intensive. Therefore, the Education Code's provisions for March 15th and May 15th notices are inhumane. It is also a disadvantage to the school districts that are seeking the best qualified professionals for their openings. A better plan is to have new administrators start in the Spring in order to be productive in the Fall, the beginning of the school year. To begin in the Spring, searches should occur in the Fall. Therefore, I recommend that notices issued in the Spring to administrators that will not be renewed, provide a minimum of six months, up to twelve months, advance notice of separation. This would provide the administrator with time to respond to this change and prepare accordingly. The reaction by the administrator could be a reasonable search or preparation for retreat to faculty, instead of knee-jerk. For additional flexibility, districts may wish to negotiate for rolling six to twelve month contracts for administrators. Should opportunities or demands arise unexpectedly, this would be a humane process for the employee.

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